IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 597

JAMES E. MILLS,

Appellant,

—v.—

STATE OF ALABAMA,

Appellee.

~~MOTION FOR LEAVE TO FILE AND~~ BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND ALABAMA CIVIL LIBERTIES UNION, *AMICI CURIAE*

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MOTION OF AMERICAN CIVIL LIBERTIES UNION AND ALABAMA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Civil Liberties Union is a forty-five year old non-partisan organization engaged solely in defense of the Bill of Rights. The Alabama Civil Liberties Union is the ACLU affiliate in the State of Alabama. The Union, which has a long history of defending free speech regardless of the point of view expressed, has been especially concerned with defense of the freedom of the press. The rights of a truly free press, a press not subject to the whim of governmental action, is one of the special characteristics of our free institutions. The statute at bar, in our opinion, seriously invades that freedom.

For these reasons we ask leave to file the attached brief. The Appellee has not consented to our appearance.

Respectfully submitted,

Melvin L. Wulf
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Interest of *Amici*

The interest of *amici* is set forth in the preceding motion.

Statement of Case

A criminal action was brought by the State of Alabama against Appellant in the Jefferson County Criminal Court for violation of the Alabama Corrupt Practices Act, Title 17, Sections 268-286, Code of Alabama of 1940, as recompiled in 1958. Appellant was prosecuted under Section 285 of the Act which provides in relevant part:

> "It is a Corrupt Practice for any person on any election day * * * to do any electioneering or to solicit any

> votes * * * for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on, on the day on which the election affecting such candidates or propositions is being held."

Appellant is editor of the Birmingham *Post-Herald*. The complaint, as amended, charged him with having caused to be distributed on November 6, 1962 an editorial which solicited votes in support of a proposition for a change of form of the Birmingham City Government from a commission to a mayor-council form of government. The complaint further averred that November 6, 1962 was an election day in the City of Birmingham and was the day on which said proposition was to be voted on.

At the trial, Appellant demurred to the complaint on the grounds that the provision of the Alabama Corrupt Practices Act in question, on its face and as applied to him, violated the free speech and free press provisions of the First Amendment to the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment, and on other grounds which will not be considered in this brief.

The trial judge sustained the demurrer, holding that the statute violated the First and Fourteenth Amendments to the Constitution of the United States and the provisions of the Alabama Constitution relating to freedom of speech and of the press and to due process of law (Article I, Sections 4 and 6). The Supreme Court of Alabama reversed.

This brief will deal solely with the proposition that Title 17, Section 285 of the Alabama Code of 1940, is unconstitutional and void in that it violates the free speech and

free press provisions of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

ARGUMENT

I.

"Electioneering" and solicitation of votes on election day with respect to a candidate or proposition to be voted on that day do not create a clear and present danger of substantive evils which the State of Alabama is constitutionally entitled to prevent.

The Alabama statute, in the present case, proscribes "electioneering" or solicitation of votes on election day. On the subjects within its scope of operation, and during the time described, it requires total silence. It is clear that the liberties protected against state action by the Fourteenth Amendment to the Constitution of the United States include the freedoms of speech and of the press protected against action of the federal government by the First Amendment provision that "Congress shall make no law * * * abridging the freedom of speech, or of the press". *Gitlow* v. *New York*, 268 U. S. 652 (1925).

Cases involving a conflict between legislation and the guaranties of the First Amendment have arisen in a great variety of contexts during the last forty years. As an inevitable result, this Court, and the various Justices who have spoken for it from time to time, have expressed the rationale for First Amendment decisions in a number of ways. The classical formulation, however, remains the "clear and present danger" test enunciated by Justice

Holmes in *Schenck* v. *United States*, 249 U. S. 47 (1919) and restated in a dissenting opinion by Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357 (1927) as follows:

> "But, although the rights of free speech and assembly [which were involved in the case before the Court] are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. * * * The necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent."

In *Dennis* v. *United States*, 341 U. S. 494 (1951) Chief Justice Vinson endorsed Judge Learned Hand's interpretation of the "clear and present danger" test as meaning that:

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950).

Under the Brandeis and Hand versions of the "clear and present danger" rule, there are three common elements to be considered: the seriousness of the "evil", the imminence or probability of its occurrence and whether the statute confines itself to restricting First Amendment rights to the extent actually required to prevent the evil.

Thus, Justice Brandeis speaks of "destruction or * * * serious injury" to the state, while Judge Hand refers to the "gravity of the evil". Brandeis requires a "clear and imminent danger" while Hand speaks in terms of discounting the "improbability" of the evil. With respect to the character of the statute in question, Brandeis inquires "if the particular restriction proposed is required in order to protect the state" while Hand uses the test of where "such invasion of free speech * * * is necessary to avoid the danger."

Presumably, the "evil" at which the Alabama statute is directed, is interference with or disruption of fair, honest and orderly elections. Granting the seriousness of this evil, it is apparent that the activities and utterances which the statute proscribes do not create a sufficiently strong or imminent probability of the "evil" occurring. It is further apparent that the statute is cast in terms which are far too broad and vague to meet the test of the clear and present danger rule that the measures taken be "necessary" or "required" to avoid the danger.

A. "Electioneering" and solicitation of votes on election day do not create a sufficiently strong or imminent probability of serious disruption of fair, honest and orderly elections to justify restriction of First Amendment rights under the clear and present danger doctrine.

It would be difficult to contend seriously that it is "clear" that fair, honest and orderly elections in Alabama are in imminent or probable danger of being disrupted if there is electioneering and solicitation of votes on election day. The common experience in those jurisdictions which do not enforce such rules as are laid down by the Alabama statute

indicates that political exchange on election day, as well as on any other day, makes a positive contribution to the validity of democratic elections. Certainly, ordinary peaceful expressions of political advocacy in the form of newspaper editorials, circulars, radio or television broadcasts or political addresses do not jeopardize either the fairness or orderly functioning of the election process. Even relatively "disorderly" methods of electioneering, such as broadcasting through loud speakers, although possibly offensive to the personal tastes of some, do not threaten the fairness and honesty of elections. Nor do they create a danger of such disorderliness as might seriously interfere with the conduct of an election. The Alabama legislature may have a preference for peace and quiet on election day and this preference may be based on a belief that fair, honest and orderly elections will be promoted thereby. However, in order to sustain Section 285, this Court must conclude not only that peace, quiet and order on election day are legitimate legislative goals, but that there is clear and imminent danger that fair, honest and orderly elections will be seriously disrupted if electioneering and solicitation of votes are permitted on election day in Alabama. This conclusion cannot be reached.

Appellee's brief below suggests an additional basis for Section 285. It asserts that the intention of the Alabama legislature was to prevent electioneering on election day because of the opportunity for unfairness and untruth in the form of last minute charges which cannot be answered because there is not time. Such an assertion of legislative purpose is based on a premise which is wholly fallacious. Irresponsible "last minute" charges are not prevented by forbidding political advocacy on election day. All that is

accomplished by such a rule is that the "last minute" in which political charges may be made is advanced to the day preceding the election. The self-defeating nature of the legislation, to the extent that this is its purpose, is obvious.

B. Section 285 is excessively vague and broad and fails to meet the requirement that legislation which limits First Amendment rights be narrowly drawn to meet specific evils.

Entirely apart from the questions of the seriousness of the danger and whether there is a clear and imminent probability of its occurrence, this Court must also consider whether "the particular restriction proposed is required in order to protect the state from destruction or from serious injury". *Whitney* v. *California, supra.* The fact is that even if the gravity of the evil and the probability of its occurrence were to be granted, the Alabama statute goes much further and cuts far more broadly than is necessary in order to reach the danger which it apparently contemplates.

Section 285 does not specifically proscribe "irresponsible last minute charges" with respect to Alabama elections. It is not the type of provision which forbids harassment or intimidation of voters. Instead of aiming at these or other specific targets, Section 285 attempts to drop a blanket of total silence on political discussion on election day. The language of the statute permits application to reasoned articles and editorials in the press, to political discussions among friends and neighbors, and to quiet orderly and peaceful activities of candidates and their supporters. As this Court noted in *National Association for the Advancement of Colored People* v. *Button,* 371 U. S. 415 (1963),

> "* * * in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. * * * The objectionable quality of vagueness and overbreath does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. * * * These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

The conclusion must be, therefore, that even if under some circumstances a state may restrict First Amendment freedoms in order to secure fair, honest and orderly elections (for example, such statutes as those which forbid electioneering within 100 feet of the polling place), it may not legislate in such a manner as to silence indiscriminately all political discussion in the hopes of achieving such a purpose. Legislation which affects First Amendment freedoms must be narrowly drawn to meet specific evils. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

II.

The "balancing" test properly should be applied only to regulation of conduct which has a minor and incidental effect on speech, or to regulation of the time, place and/or manner of speaking. It is not applicable to a regulation, the operation of which depends upon the content or subject matter of speech.

The "balancing" test was born in *Schneider* v. *Irvington*, 308 U. S. 147 (1939), in which a number of ordinances prohibiting handbill distribution were invalidated. Justice Roberts spoke for the Court as follows:

> "In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." 308 U. S. 147, 161.

It is significant that the ordinances involved in *Schneider* (including one which established a licensing procedure), involved non-discriminatory regulations of the time, place or manner of speech. They operated without regard to subject matter or content.

Section 285, although non-discriminatory as to content, is not mere regulation of conduct which incidentally affects speech. It is aimed at all forms of political expression which violate its command against speaking out on election day. It operates not just against the manner, time or place of speech, but against the subject. It does not forbid raucous or noisy public utterances, but it does forbid political advocacy whether disorderly or not.

Mr. Justice Black, in his dissenting opinions in *Barenblatt* v. *United States,* 360 U. S. 109 (1959) and *Konigsberg* v. *State Bar,* 366 U. S. 36 (1961) has pointed out that the balancing test should not be extended to legislation directly aimed at curtailing speech and political persuasion. And in *Konigsberg* the majority opinion evidenced a recognition of the limited applicability of the balancing test:

> "On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interest, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." 366 U. S. at 50-51.

Where the type of speech singled out for unfavorable treatment is political speech, it is particularly important that the continuing validity of the clear and present danger doctrine be recognized and that the doctrine be applied as the sole test of constitutionality.*

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* See *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Wood* v. *Georgia,* 370 U. S. 375 (1962).

III.

Even if the balancing test is applied in the present case, Section 285 is unconstitutional for Alabama has no subordinating interest in the silencing of political advocacy on election day which is compelling in the sense required to sustain legislation which infringes First Amendment liberties.

The balancing test itself offers no support for the validity of Section 285. The language quoted above from *Schneider* makes this perfectly clear. That language was intended to emphasize the preferred position of First Amendment rights and to establish that the ordinary criteria of proper legislative purpose and reasonableness are not sufficient to support legislation which affects freedom of speech and of the press. Frantz, *The First Amendment in the Balance,* 71 Yale Law Journal 1424 (1962). *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943), clearly establishes that the "rational basis for adopting" legislation which would support a statute against due process attack is not suffcient where freedoms of speech and of the press are involved.

In *National Association for Advancement of Colored People* v. *Button, supra,* in which this Court held a Virginia statute aimed at preventing improper solicitation of legal business to be violative of the First Amendment as applied to petitioner's activities, the Court stated:

> "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment free-

> doms. Thus it is no answer to the constitutional claims asserted by petitioners to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. * * * Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling."

This Court must "examine the effect of the challenged legislation * * * weigh the circumstances and * * * appraise the substantiality of the reasons advanced in support of the regulation." *Schneider* v. *Irvington, supra.* Such an examination, in the present case, will make it clear that Alabama has no subordinating interest in silencing electioneering and political advocacy on election day which is sufficiently compelling to warrant indiscriminate abridgment of First Amendment rights. The gist of the matter is that Section 285 can accomplish little or nothing in the way of preventing unfairness, dishonesty or disorder in Alabama elections. What it can accomplish is to strip Alabama citizens of their rights to speak and write freely on political issues on election day. These rights should not be sacrificed in the hope of forestalling the remote and speculative evils which Section 285 envisages.

CONCLUSION

Title 17, Section 285, Code of Alabama of 1940, a provision of the Alabama Corrupt Practices Act, violates the First Amendment guaranties of freedom of speech and of the press which are made applicable to the states by the Fourteenth Amendment. Under the "clear and present danger" doctrine, which governs this case, the substantive evil sought to be prevented must be extremely serious and the degree of imminence extremely high before utterances can be punished. *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). The legislation itself must be narrowly drawn to meet specific evils. Section 285 is a vague, broad, blanket proscription of freedom of speech and of the press and is aimed at activities which pose no imminent danger, and in fact no substantial threat at all, of bringing about evils which Alabama is constitutionally entitled to prevent.

Even under the balancing test, which more properly should be applied to regulations which have nothing to do with the content or subject matter of speech, rather than to a statute such as Section 285 which proscribes a certain kind of speech, the test of constitutionality is not met. Alabama has no subordinating interest in the subject matter of the legislation which is compelling when First Amendment liberties are at stake.

Alabama, by enacting Section 285, seeks to preserve fairness, honesty and order in the election process by depriving that process of its most vital ingredient—the free exchange of political thought and opinion. The fact that the proscription is limited in time does not save it, especially since it is

operative at the very time when voters are about to transform their political opinions into action. Thus, the judgment below should be reversed.

Respectfully submitted,

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